Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 273 of the	)	CC Docket No. 96-254
Communications Act of 1934, as amended	)	
by the Telecommunications Act of 1996	)	

JOINT COMMENTS OF BELL ATLANTIC AND NYNEX

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I. Introduction and Summary

In implementing Section 273 of the Act, the manufacturing provisions, the Commission should reject or modify several of the proposals contained in the Notice in this proceeding that are either contrary to the express language of the Act or that would create burdensome and unnecessary regulatory requirements.

First, the Notice misstates the scope the of activities covered by the manufacturing provisions in two important respects. Specifically, while Section 273(a) allows the Bell operating companies ("BOCs") themselves to engage in manufacturing only upon grant of in-

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

[2] The NYNEX telephone companies ("NYNEX") are New York Telephone Company and New England Telephone and Telegraph Company.

region interLATA relief, it does not restrict the BOCs' *affiliates* from manufacturing now. In addition, Section 273(b) of the Act expressly allows the BOCs to engage immediately in close collaboration with *any* equipment manufacturer, including an affiliate of another BOC, to engage in research, and to enter into any type of royalty arrangement with manufacturers.

Second, the information disclosure requirements of Section 273(c) do not require the Commission to expand further its already-expansive rules addressing public notice of network changes and disclosure of network information. On the contrary, existing regulations already require notices of network changes that are more than sufficient to meet the mandates of the manufacturing section of the Act.

Third, the requirements of Section 273(d) apply only to industry-wide standards-setting activities as defined in the Act and do *not* require individual BOCs or less than industry-wide groups of local exchange carriers ("LECs") to open their internal network planning and development activities to nonaffiliated providers. Nor does that section apply to testing of equipment by individual LECs for possible use in their own networks, or require LECs engaged in manufacturing to license proprietary technology to others.

Fourth, while Section 273(e) requires that procurement activities be conducted in a manner that does not favor the BOC's manufacturing affiliate, there should be no absolute ban on sole source procurements when there is only a single vendor of the product, or on limiting requests for proposals to a reasonable number of manufacturers or vendors.

With adoption of the rules and policies discussed below, the Commission can help ensure a continued robust, competitive marketplace for the manufacturing of telecommunications equipment and customer premises equipment ("CPE").

II. Section 273 of the Act Permits BOC Affiliates to Manufacture and BOCs to Provide Telecommunications Equipment Now.

As an initial matter, the Notice misstates the scope of the activities that are subject to the manufacturing provisions in two important respects.

First, the Notice mistakenly says that the Act "authorizes BOCs *and BOC affiliates*" to engage in manufacturing of telecommunications equipment and CPE upon obtaining Section 271(d) relief."[3] Later in the same paragraph, however, the Notice correctly concludes that the Act "allows *a BOC* to manufacture ... once that BOC has obtained authority to offer interLATA service in any of its in-region states."[4] The Commission should affirm this latter conclusion and confirm that BOCs' affiliates are not currently barred from engaging in manufacturing.

The Act ties the right of a "Bell operating company" to manufacture to grant of in-region interLATA relief.[5] "Bell operating company," in turn, is defined as enumerated companies that offer wireline telephone exchange services and their successors or assigns. This definition explicitly excludes all other affiliates.[6] As a result, the Act is clear that only *BOC* manufacturing is proscribed prior to obtaining interLATA relief.

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[3] ***Notice of Proposed Rulemaking***, FCC 96-472 at ¶ 8 (rel. Dec. 11, 1996) ("Notice") (emphasis added).

[4] ***Id.*** (emphasis added).

[5] 47 U.S.C. § 273(a).

[6] 47 U.S.C. § 153(4).

By contrast, where Congress intended a provision to apply both to BOCs and their affiliates, it so specified. For example, Section 271 establishes the conditions under which a BOC and "any affiliate" of a BOC may provide interLATA services.[7] And the exception clause at the end of Section 273(a) prohibits a BOC and "any of its affiliates" from engaging in manufacturing with a non-affiliated BOC or any of its affiliates.[8] By not including BOC affiliates in the initial clause of Section 273(a), however, Congress intentionally limited the manufacturing restriction to the BOCs themselves, not their affiliates.

Second, the Notice also incorrectly states that a BOC may "provide" telecommunications equipment only after it receives in-region interLATA relief under Section 271(d).[9] In reality, this is one of the previously permitted activities that were grandfathered when the Act was passed. Section 271(f) specifies that Section 273 does not prohibit a BOC from engaging in activities that were authorized by the decree court prior to the date of enactment.[10] By Memorandum Opinion and Order entered on March 3, 1995, Judge Greene permitted the BOCs to provide telecommunications equipment and related products.[11]

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[7] ***See*** 47 U.S.C. § 271(a).

[8] ***See*** 47 U.S.C. § 273(a).

[9] Notice at ¶ 8.

[10] 47 U.S.C. § 271(f).

[11] ***United States v. Western Electric Co., Inc.***, Civil Action No. 82-0192 (D.D.C. Mar. 3, 1995).

Accordingly, the BOCs may continue to provide telecommunications equipment without first obtaining Section 271 relief.[12]

III. The Scope of BOC Manufacturing Restrictions Are Clear in the Act.

The 1996 Act specifies that a BOC may engage in manufacturing once it receives Section 271 in-region interLATA relief in any jurisdiction.[13] The Act further defines "manufacturing" as having the same meaning as in the decree.[14] A number of questions are raised in the Notice regarding the proper interpretation of these provisions.[15] The statutory provisions, however, are clear on their face, and the Commission should not attempt to read more into them than their obvious meaning.

As the Notice correctly concludes, there is no substantive distinction between the term "manufacturing" as used in Section 273(h) and "manufacture" as used elsewhere in the section; both incorporate the decree definition.[16] The Commission should not, however, attempt here to posit every hypothetical dispute that might arise regarding the scope of the manufacturing

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[12] While Section 273(a) authorizes a BOC to "manufacture and provide telecommunications equipment" once it receives interLATA relief, this language merely clarifies that the BOC may both manufacture equipment and "provide" to the public the equipment that *it* manufactures. It does not constrain the BOC's pre-existing authority to "provide" equipment manufactured by others.

[13] 47 U.S.C. § 273(a).

[14] 47 U.S.C. § 273(h).

[15] Notice at ¶¶ 10-12.

[16] ***See id.*** at ¶ 10.

definition. Instead, because the Act expressly defines "manufacturing" as having the meaning in the decree, in the event of a dispute, the Commission should look to decree jurisprudence for direction.

The Notice does, however, misstate the scope of the Act's manufacturing restriction in two important respects. First, Section 273(b) expressly provides that, prior to obtaining interLATA relief under Section 271, a BOC may immediately "engag[e] in close collaboration with *any* manufacturer" of telecommunications equipment or CPE.[17] There is no basis for the tentative conclusion in the Notice that BOCs or their affiliates may not engage in close collaboration with a manufacturing arm of an unaffiliated BOC or its affiliates.[18] "Any" means "any;" it does *not* mean "almost any" manufacturer.[19]

Section 273(b) simply confirms that a BOC which works closely with a manufacturer during the design and development of equipment is not engaged in manufacturing and, therefore, such close collaboration is permitted both before and after the BOC obtains interLATA relief. This does not constitute a change from the decree or give the BOC authority it did not already have before enactment. AT&T, one of the parties to the decree and the

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[17] 47 U.S.C. § 273(b)(1) (emphasis added).

[18] ***See*** Notice at ¶ 11.

[19] As the courts have made clear, "[t]he word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive." ***Fleck v. KDI Sylvan Pools, Inc.***, 981 F.2d 107, 115 (3d Cir. 1992), quoting ***McCormick v. Columbia Conveyer Co.***, 564 A.2d 907, 910 (Pa. Sup. Ct. 1989); ***Leach v. Phila. Sav. Fd. Soc.***, 340 A.2d 491, 493 (Pa. Sup. Ct. 1975). ***Accord, Shea v. Vialpando***, 416 U.S. 251, 260 (1974) (the use of "any" demonstrates that Congress intended there to be "no limitation" on the relevant class); ***Harrison v. PPG Industries***, 446 U.S. 578, 588-89 (1980) (the addition of the word "any" created "expansive language" that was not subject to a limiting construction).

staunchest defender of the decree's manufacturing restriction, confirmed the BOCs' pre-existing authority when its representative told Congress what activities were not included in the ban:

> The BOCs are permitted to do basic research; applied research; design for local networks; to undertake systems engineering; the publication of generic specifications for equipment and products; creation of application software; *close collaboration of the BOCs with its suppliers when continuous interaction and feedback are necessary for a tailored product or system*; and to fund product development.[20]

As a result, a BOC may work with *any* selected supplier -- including a nonaffiliated BOC or its affiliate -- in the design and development of network equipment or CPE. So long as the BOC does not go beyond the permitted close collaboration and, for example, jointly fabricate the product with the nonaffiliated BOC, the arrangement is consistent with the Act, as it was with the decree.

Second, there is no reason to define royalty agreements solely in terms of patent rights, as the Notice suggests, and doing so would be contrary to the Act. Royalty agreements may include payments in connection with use of other forms of intellectual property rights, such as copyright and trade secret. And the Act allows BOCs to enter into any form of "royalty agreements;" nothing in the Act limits those agreements just to those involving patent rights.

Likewise, there is no need for the Commission to adopt an additional definition of what research activities and royalty agreements are permissible under Section 273(b)(2).[21] This

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[20] Statement of Jim G. Kilpatric, Senior Vice President, Law, AT&T, Hearings on the Modified Final Judgment before the House Subcommittee on Telecommunications and Finance, June 7, 14, and 21, 1989, Serial No. 101-92 at 191 (emphasis added).

[21] 47 U.S.C. § 273(b)(2). ***See*** Notice at ¶ 12.

provision allows the BOCs to enter immediately into such agreements, regardless of whether they constituted manufacturing under the decree.[22] If a particular royalty agreement did not constitute manufacturing under the decree, it is not manufacturing under the Act, and the BOCs have always been permitted to engage in that activity. No regulatory purpose would be served by trying to draw a distinction between the newly permitted and the always permitted.

IV. Additional Network Information Disclosure Rules To Implement Section 273(c) Are Not Required.

Sections 273(c)(1)-(3) require each BOC to maintain and file with the Commission information concerning "protocols and technical requirements for connection with and use of its telephone exchange service facilities" including any changes or planned changes to those items.[23] The Commission asks what specific disclosure rules are needed to implement this section.[24] Given the broad scope of the existing disclosure rules, no additional requirements should be imposed.

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[22] In ***U.S. v. Western Elec. Co., Inc.***, 12 F.3d 225 (D.C. Cir. 1993), the court held that a royalty arrangement with a manufacturer caused that manufacturer to become an "affiliated enterprise" of the BOC under the decree, so that royalty agreements effectively became prohibited manufacturing activities. By enacting Section 273(b)(2), Congress overturned this decision and expressly allowed the BOCs to enter into such arrangements immediately, without waiting for Section 271 relief and without the need for a separate affiliate.

[23] 47 U.S.C. § 273(c)(1).

[24] Notice at ¶ 18.

First, as asked in the Notice,[25] the information disclosure requirements of Section 273(c) only apply once a BOC actually engages in manufacturing. This fact is made clear by the express language of Section 273, which authorizes a BOC to engage in manufacturing once it has received interLATA authority, but to do so only "subject to the requirements of this section and the regulations prescribed thereunder."[26] As a result, until a BOC exercises its authority to engage in manufacturing, it is not subject to the requirements that attach when it does so, including the information disclosure provisions of Section 273(c).

Second, in those instances where Section 273(c) does apply, the BOCs today are subject to a number of comprehensive and overlapping requirements addressing network information disclosure and public notice of network changes that already satisfy the requirements of that section. As the Commission points out, the Computer Inquiry II, Computer Inquiry III and All Carrier Rules have long required disclosure of network information needed for interconnection with CPE, enhanced service providers, and other carriers.[27] More recently, the Commission has given an expansive reading to the notice of network changes provision of the 1996 Act.[28] In its Second Interconnection Order,[29] the Commission adopted rules requiring:

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[25] ***Id.*** at ¶ 17.

[26] 47 U.S.C. § 273(a).

[27] ***See*** Notice at ¶ 15 and nn.32-34.

[28] 47 U.S.C. § 251(c)(5).

[29] ***Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Report and Order and Memorandum Opinion and Order***, CC Docket No. 96-98, FCC 96-333, ¶¶ 166-260 (rel. Aug. 8, 1996) ("Second Interconnection Order").

public notice regarding any network change that:

(1) will affect a competing service provider's performance or ability to provide service; or

(2) will affect the incumbent LEC's interoperability with other service providers.[30]

The broad scope of this existing requirement becomes apparent in the Commission's discussion of examples of the type of changes that would trigger public disclosure:

> changes that affect: transmission; signalling standards; call routing; network configuration; logical elements; electronic interfaces; data elements; and transactions that support ordering, provisioning, maintenance and billing.[31]

This expansive requirement fully subsumes the Section 273(c) disclosure provision.

The Notice, however, misreads the statutory requirement and suggests that this provision requires disclosure of information that addresses "the specific needs of manufacturers who wish to develop new network products" and concludes that additional rules are needed.[32] In reality, the language of the Act itself is limited to disclosure of information only with respect to "connection with and use of telephone exchange service facilities."[33] Contrary to the suggestion

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[30] 47 C.F.R. § 51.325(a).

[31] Second Interconnection Order at ¶ 182.

[32] Notice at ¶ 18.

[33] 47 U.S.C. § 273(c)(1). To the extent any technical information is disclosed to the BOC's manufacturing affiliate, that information must be disclosed to competitors under Section 273(c)(3).

in the Notice, this provision is merely a safeguard designed to ensure that a BOC does not manufacture equipment with proprietary interfaces that would preclude competing manufacturers from making compatible equipment that is capable of being interconnected with the BOC's network. The Commission's existing rules, as quoted above, already serve this function. The Commission should not, therefore, adopt the tentative conclusion that the existing rules fail to meet the Section 273(c)(1) requirements.[34]

As to the timing of disclosure, current rules require public notice to be provided at the "make/buy" decision point, or at least twelve months before implementation.[35] Those rules should also apply to Section 273 disclosures. AT&T, which was then a leading manufacturer of network equipment and CPE, has argued in earlier Commission proceedings that information that is available before the make/buy point "is not sufficiently stable to be of use to CPE manufacturers in developing new products" and that a six-month lead time should be sufficient.[36] The "make/buy" point for a network product is "the time at which the incumbent LEC decides to make for itself, or procure from another entity, any product the design of which affects or relies on a new or changed network interface."[37] This decision is generally made as part of the

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[34] Notice at ¶ 18. The existing rules also require information to be disclosed with sufficiently detail that there is no need to require any additional disaggregation of the information that is disclosed. ***See id.*** at ¶ 24.

[35] ***See, e.g.***, 47 C.F.R. § 51.331(a). The rules also provide for shorter-term disclosure if the make/buy point is less than twelve months before deployment. ***Id.***

[36] ***Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, Order***, 102 F.C.C.2d 655, 683, ¶ 47 (1985).

[37] Second Interconnection Order at ¶ 216.

procurement process *after* the BOC has received and reviewed proposals from vendors and manufacturers and has decided to move forward with a new or changed network specification.

Until the BOC has received detailed specifications from the manufacturer or vendor and has reached the make/buy decision point, it will generally not have the information needed to meet the Section 273(c) disclosure obligation. This is because the BOC's procurement process generally requests manufacturers to propose methods of meeting the needs of end users by proposing products that will allow the BOC to deliver the requested services. Often the BOC must modify its original request based upon what vendors indicate that they are able to supply. Therefore, whatever detailed specifications the BOC may have placed into its procurement request may need to be changed after receiving the vendors' proposals. Only after reviewing the various vendors' proposals and deciding what equipment it will procure, ***i.e.***, the make/buy decision point, can the BOC determine and release the information required by the Act.

A notice period that is longer than that in the existing rules, as proposed in the Notice,[38] would also seriously undermine the BOCs' ability to introduce new technology in a timely manner. The Commission adopted the make/buy trigger point as reaching the proper balance between the interests of the BOCs and of their competitors. There is no justification for deviating from that carefully-tailored decision here. In fact, technology is changing at an ever-increasing pace and the time from development to market is becoming shorter and shorter. A rule that delays the BOCs' ability to deploy state-of-the-art services and technologies would serve no public interest. Clearly, the BOCs would lose sales to competitors that are not so

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[38] Notice at ¶ 22.

artificially constrained. Manufacturers would also lose business, because the BOCs would have less need to procure new equipment. Most important, the public would lose the opportunity to obtain the new, innovative services from the BOCs in a timely manner. In adopting Computer Inquiry II and Computer Inquiry III rules, and implementing Section 251(c)(5), the Commission appropriately balanced the need for a reasonable notice of network changes with the recognition that protracted notice periods would amount to market management. It should not retreat from that policy here.

In addition, the BOCs should not be required to issue disclosures when conducting technical trials.[39] Such trials are intended to help a BOC decide whether or not to deploy a certain type of equipment or technology in the network. Issuing a disclosure in connection with such a trial would serve no valid purpose, because it would not tell interconnectors or users what new network protocols or technical specifications the BOC intends to deploy. It is only after evaluating the results of the trial that the BOC will reach the make-buy decision point.

The Notice correctly concludes that the Act requires the BOCs to maintain network information in an accessible manner.[40] However, accessibility need not be limited to the Internet. A company should be permitted to use industry publications, direct mailings, and other generally-accessible means of providing the disclosures, as is the case today.[41]

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[39] ***See id.*** at ¶ 19.

[40] ***See id.*** at ¶ 21.

[41] ***See*** 47 C.F.R. § 51.329 (a)(2) (public notice may be provided through "industry fora, industry publications, or the carrier's publicly accessible Internet site").

In addition, the Commission should not require the interface specifications themselves be included in the disclosure, whether on the Internet or otherwise, for two reasons. First, the Second Interconnection Order permits, but does not require, public notices of network changes to be placed on the Internet, and not every BOC posts its disclosures on a Website.[42] Second, much of the relevant interface information is contained in third parties' publications that are either copyrighted or provided to the BOC under a non-disclosure agreement.[43] The owner of the material must be permitted to charge a reasonable price for disclosure of its intellectual property, and it is that entity, not the BOC, that should be responsible for its release.

The Commission should also limit disclosure requirements to changes in existing network specifications. The vast body of interface specifications to the existing network is widely known in the industry, and there should be an obligation to compile and publish only changes which impact that information.

The Notice asks parties to help resolve the "tension" between the "close collaboration" provision of Section 273(b) and the network disclosure section.[44] If the Commission retains, as it should, the existing obligation to disclose at the make/buy point, there is no such tension. The Act permits the BOCs to collaborate closely in the design and development of network equipment and CPE. Once the design and development work is

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[42] For example, Bell Atlantic has posted its network disclosures on the Internet, but NYNEX files its disclosures directly with the Commission.

[43] In 47 U.S.C. § 273(d)(2) Congress recognized the proprietary nature of similar information and acted to prevent its unauthorized disclosure.

[44] Notice at ¶ 27.

completed, if the BOC decides to procure that equipment, it will have reached the make/buy decision point and the disclosure obligation attaches. The close collaboration will have occurred before that trigger point.

V. The Provisions of Section 273(d) Addressing Standards Organizations Apply Only To Establishment of "Industry-Wide Standards" As Defined In the Act.

Section 273(d) of the Act contains a number of provisions that address non-accredited organizations that develop "industry-wide" standards for telecommunications equipment or CPE, or "industry-wide" generic network requirements for such equipment.[45] The Notice asks what entities this section affects, and whether the Commission should extend rules under this section to less than industry-wide standards.[46] The statutory provision is clearly limited to industry-wide standards, however, and cannot be extended.

By expressly limiting the reach of this provision to "industry-wide" standards and generic requirements, Congress made clear that it should not be applied more broadly. Instead, it provided that capabilities with less than an industry-wide reach must be publicly disclosed, to ensure that competitors can interconnect or make compatible telecommunications equipment or CPE. The Commission cannot upset this balance.

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[45] 47 U.S.C. § 273(d)(4). The term "industry-wide" is further defined as activities performed or funded by LECs with a combined total of at least 30% of the access lines deployed in the United States on the date of enactment. 47 U.S.C. § 273(d)(8)(C).

[46] Notice at ¶ 50.

There are good policy reasons behind this distinction. While Congress wanted to ensure that establishment of nationwide standards involved a cross-section of affected groups in order to prevent one industry faction from unilaterally establishing *de facto* standards, it also recognized that individual competitors must be able to distinguish their own networks and services without involving competitors in the network design. For this reason, Congress included provisions requiring public notice of network changes made by a single company that affect interconnection or use of that company's network. Forcing one competitor to bring in the entire industry when designing or developing its own internal network capabilities would stymie competition and innovation and undermine the pro-competitive tenets of the Act.

The Commission should also treat all non-accredited standards bodies the same. For example, Bellcore should not be treated differently from any other such organization, except for the manufacturing limitations which apply only while Bellcore is a BOC affiliate.

Finally, the Notice requests comment on the extent to which the provisions of Section 273(d)(2) relating to release of proprietary information apply to ISO 9000 certification, which, as acknowledged in the Notice, is a series of standards that provide "quality assurance requirements and quality management guidance."[47] The ISO 9000 series does not set standards for telecommunications equipment or CPE, establish generic network requirements, or certify network equipment or CPE. As a result, it does not fall within the reach of Section 273(d)(2), which is expressly limited to those types of standards.

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[47] ***Id.*** at ¶ 40 and n.73. The fact that a particular entity, such as NYNEX Science and Technology, is compliant with one or all of the ISO 9000 series standards simply means that its internal processes follow certain industry quality standards and suggests nothing about the technical characteristics of the entity's products and services.

VI. Testing of Equipment to Determine Compatibility with the Network Does Not Constitute "Certification" As Defined In Section 273(d).

The Notice asks what, if any, rules are needed to govern the activities of an entity when it engages in product certification of telecommunications equipment or CPE.[48] At the outset, the Commission should recognize that the act of "certification" under the Act consists of testing by a separate entity for the benefit of "more than one local exchange carrier."[49] It does not apply to the testing of a product for the sole purpose of determining whether it is compatible with the tester's *own* network, or whether it will perform the intended network functions.

For those testing arrangements that do fall within the definition of "certification," the Commission should find that the provisions of the Act are being met if a carrier addresses each testing activity on a product-specific basis. The Act requires that the testing criteria be "published," "auditable," and "available."[50] However, the specific criteria used to test network products often vary widely based upon the type of product being tested and the role that it will serve in the network. A "one size fits all" set of testing procedures could not address the myriad of different products, meeting different network needs, that must be tested. Accordingly, the provisions of Section 273(d)(4)(B) are satisfied so long as the testing procedures for each type of product are written, available to any manufacturer upon request, and applied in a non-discriminatory manner to all items of comparable equipment.

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[48] ***Id.*** at ¶ 55.

[49] 47 U.S.C. § 273(d)(8)(D).

[50] 47 U.S.C. § 273(d)(4)(B).

VII. Rules Are Not Required to Define What Constitutes Preferential Treatment of Affiliates Under Section 273(d)(4)(D).

The Act prohibits a standards-setting or certifying entity from giving a preference to its own equipment, or that of an affiliate, in setting standards or certifying equipment.[51] The Commission asks how this section should be interpreted.[52] Enforcement of this provision should be through the Section 208 complaint process, in which the complainant must document its claim that the BOC is giving a prohibited preference to its affiliate. The Commission should not attempt to enumerate all the bases upon which a complainant could show such a preference. Such a hypothetical list could be both over- and under-inclusive and provide little guidance to the industry. Instead, in the event claims of undue preference are filed, the Commission should examine each on its own merits, based upon the facts presented.

The Notice also inquires as to whether licensing of proprietary technology on reasonable terms should be mandated.[53] Nothing in the Act mandates licensing of patented technology, nor may the Commission require that non-patented proprietary technology be publicly disclosed. A manufacturer or vendor that has developed a product and obtained a patent should have the right to exploit the invention to the extent permitted under patent law, or to decline to seek a patent and retain rights to it as a trade secret, and nothing in the Act permits the

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[51] 47 U.S.C. § 273(d)(4)(D).

[52] Notice at ¶ 57.

[53] ***Id.***

Commission to interfere with those rights. Absent an express requirement in the Act, moreover, forcing a LEC to license proprietary technology would constitute an unauthorized taking of the LEC's intellectual property, in violation of the Fifth Amendment.[54]

VIII. Section 273(e) Does Not Require a BOC That Is Engaged in Manufacturing to Conduct Competitive Procurements If There Is Only One Source Of the Product.

The procurement provisions of Section 273(e) generally prohibit the BOCs from giving any preference to their own affiliated or "related" manufacturer when procuring network equipment.[55] As in the case of the disclosure rules addressed above, these provisions apply only to a BOC that is engaged in manufacturing under the Act. In fact, Section 273(e)(1) goes even further and expressly states that these provisions apply *only* "for the duration of the requirement for a separate subsidiary including manufacturing."[56] As a result, both before that time (*i.e.*, before the BOC begins to manufacture) and after (three years after interLATA authority), the procurement provisions do not apply.

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[54] ***See Chesapeake and Potomac Tel. Co. of Virginia v. United States***, 830 F.Supp. 909 (E.D.Va. 1993).

[55] 47 U.S.C. § 273(e). The term "related person," as used in § 273(e)(1)(B), is not defined, but it could reasonably be interpreted to include a company in which the BOC has an equity interest but that does not qualify as an "affiliate" under the Act (***i.e.***, less than 10% interest). The definition should *not*, however, include an entity that manufactures equipment from which the BOC receives a royalty or with which it collaborates in designing or developing equipment, as the Notice suggests. Notice at ¶ 67. These latter arrangements are not manufacturing, as discussed above, and should not be held to make the vendor "related" to the BOC under the manufacturing provisions of the Act.

[56] 47 U.S.C. § 273(e)(1).

Even where Section 273(e) does apply, moreover, that provision generally requires only that the BOCs "consider" products from nonaffiliated vendors. Rather than trying to define "consider" by looking at dictionary definitions,[57] the Commission should recognize that Congress intended to prevent the BOCs from foreclosing other vendors from a reasonable opportunity to provide their products to the BOCs. So long as nonaffiliated vendors are given a reasonable opportunity to participate in the procurement process, this provision is satisfied.

In particular, the BOC should make a good faith effort at surveying the market to determine whether the particular type of equipment is available from multiple sources. If only one vendor is providing the product at the time of the procurement, then the BOC should be able to obtain it from that source, whether affiliated or nonaffiliated. If the BOC subsequently learns that additional vendors are producing the product, then subsequent procurements of that product must consider products from multiple vendors.

If a product is available from multiple vendors, the BOC must provide a reasonable number of such vendors an opportunity to participate in the procurement process. Nothing in the statute requires that every possible vendor be included in every procurement process, so long as a reasonable number of the vendors that are included are unrelated to the BOC.

In making the "objective" product selection required by the Act,[58] of course, the BOC need not base its decision on price alone. In fact, the Conference Report states that "[e]ach

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[57] ***See*** Notice at ¶ 65.

[58] ***See*** 47 U.S.C. § 273(e)(2) and Notice at ¶¶ 66, 68.

BOC shall make procurement decisions on the basis of an objective assessment of price, quality, delivery, and other commercial factors."[59] If the BOC is able to demonstrate that it reasonably considered such factors in reaching its procurement decision, the Commission should not attempt to second-guess the purchase.

In enforcing these provisions, there is no need for the Commission to increase the regulatory burden through regularly-scheduled audits or reports, as the Notice suggests.[60] The Commission should, instead, rely on the complaint process to address individual allegations of discriminatory conduct. If it finds that a pattern of valid complaints against an individual BOC warrants an audit or special reporting requirement, it can so order, but there is no justification for imposing such burdensome and expensive obligations in advance or on all BOCs.

There is no basis for the suggestion in the Notice that a manufacturer may be unwilling to complain about a procurement for fear of losing future sales.[61] Few if any participants in the telecommunications industry has ever been reticent to file complaints, and there is no indication that equipment manufacturers are or will be any different. Therefore, the Commission should rely on the tool that Congress has provided, the complaint process, to hear allegations that Section 273 is being violated.

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[59] Conf. Rep. at 155. Those factors may not, of course, include the BOC's equity ownership in the vendor.

[60] Notice at ¶¶ 69, 73.

[61] ***Id.*** at ¶ 69. Such reprisals themselves could be grounds for discrimination complaints.

IX. Conclusion

Accordingly, the Commission should adopt the policies and findings addressed herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1997 a copy of the foregoing "Joint Comments of Bell Atlantic and NYNEX" was served by hand on the parties on the attached list.

Tracey M. DeVaux

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